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MEMORANDUM OF LAW

DATE: April 27, 2005

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: Rescission of Ordinance O-19126, Re: Five Year Vesting Requirement

INTRODUCTION

During the course of the investigations into the fiscal crisis currently facing the City, the City Attorney's Office has had an opportunity to examine the pension system and evaluate the root causes of the current deficit. As the investigations progressed, a clear picture began to emerge. As early as 1996, the Mayor, the City Council and the City Manager began to see the pension fund as a resource from which they could grant special benefits and enhancements to City employees,¹ union presidents,² and at times, senior city staff.³ One such benefit was the waiver of the ten years of service required for vesting pursuant to San Diego City Charter Section 141.⁴

As outlined below, Charter section 141, as originally adopted in 1931, required that an employee work ten years before becoming eligible to receive a pension from the City.⁵ A failed attempt to amend this section, Proposition C, which attempted to establish a five year vesting period, was initiated in November 2001.⁶ According to the ballot statement, Proposition C was needed in order to provide the City "more opportunity to hire qualified senior employees from the private sector." In March 2002, the voters rejected Proposition C. Even though this measure failed, the City Council unilaterally adopted a five year vesting requirement by amending the Municipal Code via Ordinance O-19126, adopted in December 2002.

¹ See, e.g., San Diego Ordinance O-18835, which established a 3.0% Retirement Factor for all members of the public safety retirement system.

² See, e.g., San Diego Resolution R-297212.

³ See, e.g., San Diego Ordinance O-19126, which waived the ten-year service requirement for vesting, established in San Diego City Charter §141.

⁴ San Diego City Charter Article IX, §141.

⁵ Original Charter §141, as adopted in 1931.

⁶ San Diego Proposition C (2002).

In the *Gleason*⁷ case, members of the retirement system challenged the City's ability to under fund the pension system by simply amending the Municipal Code that defined the Charter mandated funding requirement. In settling this litigation, the City acknowledged that it cannot circumvent the intent of the Charter by amending the Municipal Code. The intent of the Charter on this matter is clear: a City employee must actually work ten years in order to receive a City pension. Further, an attempt to remove the Charter-mandated ten-year vesting provision was rejected by the voters. Any subsequent attempt to circumvent the express intent of the voters by amending the Municipal Code leaves the City open to the same type of liability it faced in *Gleason*. Therefore, the City Attorney's Office recommends that the City Council rescind Ordinance O-19126; and instead, adhere to both the intent of the Charter and the will of the voters by re-establishing the ten year service requirement of the Charter.

II

DISCUSSION

A. The History of Charter §141—The Ten Year Vesting Requirement Has Been Present in the City Charter Since its Adoption in 1931

Article IX of the San Diego Charter was adopted in 1931 and governs the retirement of City employees. Originally, Article IX, section 141 set forth the vesting requirements for the pension system, stating the following: "[I]n no retirement system, so established shall an employee be retired...before he reaches the age of sixty-two and before ten years of *continuous service*...."⁸ The section made it clear that to become a vested member of the retirement system, an employee was required to work ten uninterrupted years.

In 1994, City officials decided to make a change in Charter section 141 for the benefit of certain City workers who had not served at least ten years in a row. Some employees, for example, had performed a year or more of military service during their vesting period, or had taken a leave of absence for personal reasons. As originally set forth in the Charter, the term "continuous service" acted to disqualify employees in those types of situations from the retirement system. Under this rule, even if a City employee worked nine years in a row, took a year off to perform, for example, National Guard duty, and then served another nine continuous years with the City, for a total of 18 actual years served, he or she would not yet be vested in the retirement system. The City desired to correct this inequitable result.

The City submitted Proposition D to the voters in a special municipal election on November 8, 1994. Proposition D sought to amend Charter section 141 and to delete the portion of the original Charter section 141 which spoke of "continuous service" and in its place substitute the following language for general members (with a similar provision for fire and safety members): "No employee shall be retired before reaching the age of sixty-two years and

⁷ *Gleason v. City of San Diego*, San Diego Superior Court Case No. GIC 803779.

⁸ San Diego City Charter Art. IX, section 141 (as adopted in 1931) (emphasis added). (See fn 5)

before completing ten years of service for which payment has been made....”⁹ The voters overwhelmingly passed Proposition D, with 181,901 votes for and 69,935 against.¹⁰

The amended version of the Charter, as set forth in Proposition D, accomplished its purpose—allowing workers to vest once they have worked ten actual years even if their services was interrupted by time off. However, this amendment can not allow “bought years” (under the purchase of service provisions of the Municipal Code, discussed more fully in Part B, below) to count toward the ten years of service required. The ballot argument in favor states::

This proposition would ensure that City employees would not lose their pensions if their employment were interrupted by reasons such as other employment, family leave or military service. This proposition also ensures that a City employee would have to work the required minimum number of years and make the required contributions in order to qualify for a pension at retirement age.¹¹

No argument against Proposition D was filed and none appeared in the ballot pamphlet. The argument in favor also specified that no substantive changes were to be made to the pension system, and that no pensions would be increased: “This proposition is a housekeeping amendment....It does not change current practice. It does not increase pensions for City employees. It does not cost you, the taxpayer, one cent.”¹²

Recently, in the case of *Robert L. v. Superior Court*, 30 Cal. 4th 894 (2003), the California Supreme Court has given clear guidance on the interpretation of propositions:

In interpreting a voter initiative, [the court] applies the same principles that govern statutory construction. [The court] turn[s] first to the statute, giving the words their ordinary meaning. The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme in light of the electorate’s intent. When the language is ambiguous, [the court] refer[s] to other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.¹³

Id. at 900-01 (citations omitted).

⁹ San Diego Proposition D (1994).

¹⁰ San Diego Resolution R-285240, p. 7.

¹¹ San Diego Proposition D, “Argument in Favor of Proposition D” (1994).

¹² *Id.*

¹³ *Robert L. v. Superior Court*, 30 Cal. 4th 894, 900-01 (2003).

Thus, the plain language of Proposition D and of its supporting argument in the ballot pamphlet lead simply and directly to the conclusion that Proposition D was intended to assist workers who had broken up their years of service, but not allow a worker to vest who had not actually worked the ten required years.

In 2002, City officials attempted to shorten the ten year vesting requirement by amending the City Charter through a new proposition, Proposition C. Proposition C would have (if passed) amended the ten year vesting requirement originally built into Charter section 141 so that only five years of actual service would be required. The voters rejected Proposition C, and the Charter was not amended.¹⁴ Thus, the ten year vesting requirement remains.

B. The History of “Purchase of Service Credit” Sections of the Municipal Code: In 2002, the City Attempted to Evade the Requirements of the City Charter

1. Various Purchase of Service Provisions Consolidated in 1993

In 1993, ordinance O-17938 reorganized the purchase of service credit available to members of the Retirement System.¹⁵ Before 1993, purchase of service was discussed in scattered portions of the Municipal Code. The 1993 ordinance does not include a limit on the number of years that may be purchased, and is silent as to vesting requirements. The relevant section of the ordinance reads: “SEC. 24.1310....To purchase service credit, a Member must elect to pay and thereafter pay, in accordance with such election and prior to retirement, into the retirement fund an amount, including interest, determined by the Board.” Notably, the purchase of service options available in 1993 did not include the so-called “air time,” which are years bought without any underlying work period or authorized leave. Years could be purchased for an employee’s probationary period (during which they could not join the retirement system), military service, or part-time work, among others.

2. In 1997 and Again in 1998, the Municipal Code Was Amended Allowing “Air Time,” But Limiting Those Purchases of Service to Five Years, and Specifying That Those Years Would Not Count Toward Vesting

In 1997, O-18383 was passed, which specified that a member could purchase five years of unspecified “air time” credit, but that those purchased years could not count toward vesting. The relevant portion of O-18383 read:

SEC. 24.1312....Any person employed by the City of San Diego on the date of December 31, 1996, may purchase up to a maximum of five (5) years of service credit....However, in no event shall the

¹⁴ Resolution R-296287.

¹⁵ San Diego Ordinance O-17938 (July 12, 1993)

years purchased pursuant to this provision qualify to satisfy the vesting requirement set forth in Section 141 of the San Diego City Charter.¹⁶

In 1998, O-18600 was passed, which stated in its “recitals” clauses that it was still necessary to specify in the purchase of service provisions that purchased years could not be used to satisfy the ten year vesting requirements.¹⁷ However, the resolution portion of ordinance O-18600 made no actual changes to the existing language in the Municipal Code regarding vesting. Thus, the language put in place by O-18383 remained.

3. In 2002, The Municipal Code Was Amended to Allow Purchased Years to Count Towards Vesting, Even Though This Conflicted With the City Charter

In 2002, O-19126 was enacted by the City Council, which stated in its “recitals” clauses that it was to do the following:

[Remove] the current prohibition against counting a purchase of Creditable Service set forth in San Diego Municipal Code section 24.1312 towards the ten-year vesting requirement set forth in section 141 of the San Diego City Charter....¹⁸

The ordinance then proceeded to remove the portions of Municipal Code section 24.1312 which prohibited using the purchased years towards the vesting requirement. As set forth in the strike-out version of the new Municipal Code section 24.1312, the changes (in strikeout type) appeared as follows:

§24.1312....Any Member may purchase a maximum of five years of Creditable Service, in addition to any other Creditable Service the member is eligible to purchase under this Division. The cost of Creditable Service purchased under section 24.1212 is the amount the Board determines to be the employee and employer cost of that Creditable Service. ~~Any Member employed by the City of San Diego on the date of December 31, 1996, may purchase up to a maximum of five (5) years of Creditable Service in addition to any other purchase of Creditable Service benefit for which that Member was eligible as of December 31, 1996. However, in no event shall the years purchased pursuant to this provision qualify to~~

¹⁶ San Diego Ordinance O-18383 (February 25, 1997), p. 36.

¹⁷ San Diego Ordinance O-18600 (November 10, 1998).

¹⁸ San Diego Ordinance O-19126 (December 3, 2002), p.4. (*See* fn 3)

~~satisfy the ten year vesting requirements set forth in Section 141 of
the San Diego City Charter.~~¹⁹

The final version of Municipal Code section 24.1312 reads accordingly, leaving out the portion in strikeout text.²⁰

In making the above revision, the Mayor, City Council, and the City Attorney's Office attempted to accomplish a reduction in the ten year vesting requirement set forth in Charter section 141 through Proposition C (discussed in Part II.A, above), they attempted to modify the Municipal Code instead. This attempted modification was contrary to the clear intent of the Charter and the intent of the voters in rejecting Proposition C.

C. Ordinance No. O-19126 Should Be Rescinded

Charter section 146 empowers the San Diego City Council to "enact any and all ordinances necessary, in addition to the ordinance authorized in section 141 of this Article [establishing a retirement system], to carry into effect the provisions of that Article."²¹ It further provides that "any and all ordinances so enacted shall have equal force and effect with th[at] Article and shall be construed to be a part thereof as fully as if drawn herein."²² However, while the City Council is empowered to enact retirement ordinances, it is not empowered to enact retirement ordinances that conflict with the Charter.

In *Montgomery v. Board of Admin., et al.*, 34 Cal. App. 2d 514 (1939)²³, the plaintiffs sued the San Diego City Employee's Retirement System Board of Administration to compel it to pay retirement benefits which they claimed they were entitled to under the provisions of the City's Charter and ordinances. To resolve their claims, which were based upon retirement ordinances which conflicted with the City Charter (*Id.* at 520), the Court of Appeal for the Fourth Appellate District was required to construe the provisions of Charter section 146. The court reasoned and held:

The section grants to the city council power to pass ordinances proper "to carry into effect the provisions of this article." This quoted portion of the section gives the city council power to pass ordinances to administer and carry out the terms of the charter. It gives no authority to pass any enactment that conflicts with the charter provisions. In view of that provision of the section, we

¹⁹ Draft of San Diego Ordinance O-19126.

²⁰ San Diego Municipal Code §24.1312. (Current)

²¹ San Diego City Charter Article IX, §146.

²² *Id.*

²³ *Montgomery v. Board of Administration, et al.*, 34 Cal. App. 2d 514, 520 (1939).

must hold that it is only an ordinance that puts into effect charter provisions that is to have the same force and effect as though a part

of and included in the charter; that *the section does not empower the city council to pass any ordinance conflicting with the charter or that may have the effect of amending it.*

Montgomery, 34 Cal. App. 2d at 521 (emphasis added).

Thus, the language in Charter section 146 that “any and all ordinances so enacted shall have equal force and effect” with the Charter does not authorize the City Council to enact ordinances that conflict, modify, or amend the Charter. Otherwise, it would violate section 3, subdivision (a) of article XI of the California Constitution, which requires that Charter amendments be approved by a majority of voters.²⁴ (*Id.* at 520.) More recently, in *Grimm v. City of San Diego*, 94 Cal. App. 3d 33 (1979), the court reaffirmed that Charter section 146 only “gives the city council power to pass ordinances to administer and carry out the terms of the charter. It gives no authority to pass any enactments that conflict with the charter provisions.”²⁵

In 1992, the voters of California amended the California Constitution to prevent politicians from tampering with the state and local pension funds. Under the California Pension Protection Act of 1992 (enacted by the passage of Proposition 162), Article XVI, section 17 of the California Constitution was amended to grant retirement boards “plenary authority and fiduciary responsibility for the investment of moneys and the administration of the system.” The express “purpose and intent” of the amendment was “give the sole and exclusive power over the management and investment of public pension funds to the retirement boards selected or appointed for that purpose, . . . and to prohibit the Governor or any executive or legislative body of any political subdivision of this State from tampering with public pension funds.” *Westly v. CALPERS*, 105 Cal. App. 4th 1095, 1110 -11 (2003).²⁶ The measure was intended to protect pension funds from the tax increases which result if “state and local politicians are permitted to divert public pension funds.” *Id.* at 1111.

By enacting O-19126, the City Council “tampered with public pension funds” for the benefit of a select class of employees. The “independent” Board of Administration, ostensibly set up to protect the fund from the politicians, allowed this amendment to the Municipal Code. However, neither the City Council nor the SDCERS Board may enact ordinances or adopt rules circumventing the San Diego City Charter. Because O-19126 contradicts the ten year vesting requirement contained in Charter section 141, it must be rescinded.

²⁴ California Constitution, Article XI, subdivision (a), section 3.

²⁵ *Grimm v. City of San Diego*, 94 Cal. App. 3d 33, 39 (1979).

²⁶ *Westly v. CALPERS*, 105 Cal.App.4th 1095, (2003).

III

CONCLUSION

In circumventing the ten year vesting requirement in Charter section 141, the Mayor, City Council, City Attorney, and City Manager “tampered” with public pension funds in direct contravention of the City Charter and the California Pension Protection Act of 1992. As outlined, the enactment of O-19126 contradicted a long standing tenet of the San Diego City Retirement System; namely, that a City employee must work for the City for ten years before becoming eligible for a City pension. The Council recognized the Charter required a ten year vesting element when it originally enacted the purchase of service credit program. Municipal Code section 24.1312, before it was amended, clearly stated that the purchase of “air time” could not be used as part of the ten year vesting requirement. The amendment, which simply deleted this language from section 24.1312, cannot override the clear mandate of the charter. In order to protect the City from further liability associated with pension ordinances and resolutions, Ordinance O-19126 should be rescinded and the ten year vesting requirement of the Charter should be re-instituted.

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